**THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 24.08.2007

\+ **ARB. P. 381/2006**

**ORIENTAL INSURANCE COMPANY LIMITED** ... Petitioner

- versus -

**M/S UNITECH LIMITED & ANOTHER** ... Respondents

**Advocates who appeared in this case:**
For the Petitioner : Mr Rajiv Tyagi with Ms Chanchal Biswal
For the Respondents : Mr V.K. Sharma

**CORAM:-**
**HON'BLE MR JUSTICE BADAR DURREZ AHMED**

1. Whether Reporters of local papers may be allowed to see the judgment? YES

2. To be referred to the Reporter or not? YES

3. Whether the judgment should be reported in Digest? YES

**BADAR DURREZ AHMED, J(ORAL)**

1. This is an application filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act'). The first prayer in the application is that this court ought to determine the arbitrability of the dispute and declare that the dispute with regard to denial of liability pursuant to repudiation of the insurance policy is outside the purview of the arbitration clause contained in the Contract of Insurance. The second prayer is that an arbitrator be

appointed on behalf of the petitioner for determination of the quantum of loss, if any, suffered by the respondent. The normal residual prayer has also been made. The question that arises at the outset is whether the present application is at all maintainable and whether it can be construed as an application under Section 11 of the said Act ?

2. The parties had entered into a contract, the details of which are not necessary for the present. Clause 7 contained the arbitration clause which reads as under:-

> "7. If any differences shall arise as to the quantum to be paid under this Policy (liability being otherwise admitted) such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two disinterested persons as arbitrators of whom one shall be appointed in writing by each of the parties within two calendar month after having been required to do in writing by the other party in accordance with the provisions of the Arbitration Act 1940, as amended from time to time and for the time being in force. In case either party shall refuse to fail to appoint arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint sole arbitrator and in case of disagreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who

> shall sit with the arbitrators and preside at their meetings.
>
> It is clearly agreed and understood that no difference or dispute shall be referrable to arbitration as hereinbefore provided, if the Company has disputed or not accepted liability under or in respect of this Policy.
>
> It is hereby expressly stipulated and declared that it shall be condition precedent to any right of action or suit upon this Policy that the award by the arbitrator, arbitrators or umpire of the amount of the loss or damage shall be first obtained.
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> It is also hereby further expressly agreed and declared, that if the Company shall desclaim liability to the Insured for any claim hereunder and such claim shall not, within 3 calendar months from the date of such disclaimer have been made the subject matter of a suit in court of law, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."
>
> (underlining added)

The key expression used in the clause is "liability being otherwise admitted". The admitted understanding of the clause is that if the insurance company admits its liability to pay, but disputes the quantum, then the said dispute is referable to arbitration. According to the petitioner, the liability has nowhere been admitted by the petitioner and, therefore, the arbitration clause is not attracted at all.

3. The facts are that on 08.11.2005, the respondent No.1 (Unitech Ltd) issued a notice invoking the arbitration clause. The said arbitration clause was invoked in the following manner:-

> "8. Clause – 7 of the policy provides that in the event of differences arising as to the quantum to be paid under the policy, such differences shall be referred to a decision of the arbitrator. In view of the contents of Clause – 7 of the policy, I on behalf of my client do hereby proposed the name of Dr. Arun Gopal Aggarwal, FICWA, SCS, SICA, FIMA, Ph.D., (Mobile No.:981003204), IIB-76, Vaishali, Ghaziabad, U.P., who may be appointed as the Sole Arbitrator to arbitrate upon the disputes that have arisen between you on one side and my client on the other. If you shall refuse or fail to concur in the appointment of Dr. Arun Gopal Aggarwal within two calendar months after the receipt of this notice then in that case Dr. Arun Gopal Aggarwal will become the Sole Arbitrator and shall act accordingly.
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> 9. You are, therefore, hereby called upon to concur in the appointment of Dr. Arun Gopal Aggarwal so that the matter in dispute can be referred to him for adjudication according to law."

Apparently, a reply was sent by the petitioner on 02.12.2005 saying that the dispute was not arbitrable and, therefore, they refused to appoint and / or nominate an arbitrator. According to the learned counsel for the respondents, this clearly amounted to the petitioner not agreeing to the

appointment of Dr. Arun Gupal Aggarwal as an arbitrator. Therefore, as per the arbitration clause, the petitioner could nominate an arbitrator on its behalf within two months. It is submitted that the period of two months expired and the petitioner did not appoint / nominate any arbitrator on its behalf. Accordingly, the respondent No.1 sent a letter dated 31.01.2006 to Dr Arun Gopal Aggarwal, the arbitrator nominated by it, indicating that in the aforesaid circumstances he had become the sole arbitrator and he was requested to proceed with the matter in accordance with the provisions of law. The exact words used in the said letter are as under:-

> "No response has been received from the Insurance Company despite the service of the notice above said upon the Insurance Company on 11th November, 2005 and thus 60 days or 2 months from the date of service have expired long back. Contents of notice dated 08th November, 2005 have thus been not disputed and are deemed to be admitted. Thus liability has not been disputed by the Insurance Company and has rather been admitted in the facts and circumstances of the case, and disputes relate to only to the quantum to be paid by Insurance Company to my clients.
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> In the facts and circumstances narrated above, you have become the Sole Arbitrator in the matter and you are, therefore, requested to proceed with the matter in accordance with the provisions of law."

4. Thereafter, on 22.04.2006, the first hearing was held before the said arbitrator. On 05.05.2006, the petitioner moved an application under Section 16 of the said Act before the learned arbitrator requiring the arbitrator to rule on his own jurisdiction. The contention of the petitioner in that application was that there was no arbitrable dispute and, therefore, the entire proceedings were without jurisdiction. During the pendency of the said Section 16 application, the petitioner filed the present petition under Section 11. This petition was filed on 17.08.2006. During the pendency of this petition, the arbitrator passed an order on 26.12.2006 ruling on his own jurisdiction and indicating that he had jurisdiction to continue with the arbitration proceedings.

5. In the context of these facts, it has been argued by the learned counsel for the petitioner that the arbitration proceedings are without any jurisdiction and the petitioner is well within its rights to have moved an application under Section 11 for a decision before this court as to the arbitrability of the dispute. The learned counsel for the petitioner placed reliance on the decision of the Supreme Court in the case of ***Wellington Associats Limited v. Kirit Mehta*: 2000 (4) SCC 272**. He also placed reliance on the decision of the Supreme Court in the case of ***M/s S.B.P.***

***& Co. v. M/s Patel Engineering Ltd and Another*: AIR 2006 SC 450**. Referring to these decisions, the learned counsel for the petitioner contended that this court, while acting under Section 11 of the said Act, could rule on the jurisdiction of the arbitrator as also whether a dispute was arbitrable or not. He submitted that this court could also rule on the issue of whether there existed an arbitration agreement between the parties or not. Specifically, the learned counsel for the petitioner placed reliance on Section 11 (6) (a) of the said Act.

6. The learned counsel for the respondents submitted that this petition was not maintainable because Section 11 can only be invoked when a party seeks the appointment of an arbitrator. What the petitioner seeks in the present case is a declaration that there is no arbitrable dispute and that the arbitrator has no jurisdiction to continue with the arbitration proceedings. He submitted that this is not permissible under Section 11 of the Act which relates only to the question of appointment of the arbitrators.

7. I have considered the arguments advanced by the counsel for the parties. The first thing that has to be seen is whether Section 11

provides for a petition of the nature that is in question before this court. The heading of Section 11 is "Appointment of Arbitrators". Section 11 (1) provides that any person of any nationality may be appointed as an arbitrator unless otherwise agreed by the parties. Sub-Section (2) of Section 11 provides that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or the arbitrators. In the present case, there is an arbitration clause and the same has already been referred to. Therefore, the parties have agreed on a procedure for appointing the arbitrators. Consequently, sub-section (6) of Section 11 would become relevant. The said sub-section reads as under:-

> "(6) Where, under an appointment procedure agreed upon by the parties,—
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> (a) a party fails to act as required under that procedure; or
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> *(b)* the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
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> (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

A plain reading of the aforesaid provision indicates that the same is directed towards the object of securing the appointment of an arbitrator. The clear meaning is that where an agreed procedure for appointment of an arbitrator has not been acted upon by a party, then the Chief Justice may be requested for taking necessary measures for securing the appointment of an arbitrator. The entire focus of the the provision is towards the object of securing the appointment of an arbitrator. Unless and until that is the object of an application under Section 11, the Chief Justice or his designate would not have jurisdiction in entertaining any other ancillary or related issue pertaining to arbitration. Section 5 of the said Act has also to be kept in mind which categorically provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I, no judicial authority shall intervene except where so provided in the said Part.

8. The learned counsel for the petitioner placed strong reliance on the observations of the Supreme Court in the case of ***Wellington Associates Limited*** *(supra)* where the Supreme Court (in para 15) was of the view that Section 16 does not take away the jurisdiction of the Chief Justice of India or his designate, if need be, to decide the question of the

"existence" of the arbitration agreement in case such a question is raised by the respondent in his reply to a petition filed under Section 11. The learned counsel for the petitioner submitted that it can, therefore, be inferred that in a petition filed under Section 11, the question of existence of an arbitration agreement and the jurisdiction of an arbitrable tribunal can be gone into. He submits that it is in this context that the petitioner has filed the petition saying that since there was no admission of liability on the part of the petitioner, the dispute was not arbitrable. He submits that this issue can be ruled upon by this court in the present petition. I am unable to agree with this submission made by the learned counsel for the petitioner. If one carefully goes through the decision of the Supreme Court in the case of ***Wellington Associates Ltd*** *(supra)*, one will find that what the Supreme Court has observed and held is that the existence of Section 16 does not debar the Chief Justice from ruling on the jurisdiction and / or existence of an arbitration agreement in case a petition under Section 11 is brought before the Chief Justice for the appointment of an arbitrator. As pointed out above, the question of jurisdiction can be gone into by the Chief Justice and adjudicated upon if the respondent raises the issue of existence of an arbitration agreement. In the present case, the respondent does not raise the issue of existence of

an arbitration agreement. In fact, the respondent had gone ahead and invoked the arbitration clause and an arbitrator has been appointed. The arbitrator has also ruled on his jurisdiction under Section 16 of the said Act. A reference can also be made to the following observation in para 16 of the Supreme Court decision in the case of ***Wellington Associates Ltd*** *(supra)* which reads as under:-

> "... Take a case whether the matter has gone to the arbitrator without the intervention of an application under Section 11. Obviously, if the question as to the existence of the arbitration clause is raised before the Arbitral Tribunal, it has power to decide the question. .."

In the present case, the matter had gone to the arbitrator without the intervention of an application under Section 11. In this context, the arbitrator had jurisdiction and power to decide the question of existence of an arbitration clause as well as of an arbitrable dispute. The learned arbitrator, in fact, has already decided that issue. Therefore, this court even in view of the observations made in ***Wellington Associates Limited*** *(supra)* would not have jurisdiction in entertaining this issue which is sought to be raised by the petitioner in this petition where he does not primarily seek the appointment of an arbitrator.

9. The learned counsel for the petitioner had also placed strong reliance on the decision of the Supreme Court in the case of ***S.B.P. & Company*** *(supra)* (as set out in para 38 of the said decision) where the Supreme Court observed as under:-

> "38. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to

> be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral tribunal."

The learned counsel for the petitioner also placed reliance on the summary conclusion given in para 46 (iv) of the said decision which reads as under:-

> (iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the judge designated would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the judge designate."

10. Reading the above observations of the Supreme Court, it is clear that once a party approaches the Chief Justice with a request for appointment of an arbitrator or arbitrators, then it would be within the powers of the Chief Justice or his designate to even examine the existence of an arbitration agreement, whether the claim is time barred,

whether the claim is a dead one and other related issues. Specifically, it is pointed out in para 38 extracted above that the Chief Justice has to decide whether the applicant has satisfied the conditions for appointment of an arbitrator under Section 11 (6) of the Act. The whole thrust of the provision as well as of the decision of the Supreme court is directed towards the appointment of an arbitrator and not the other way round. The petitioner here does not seek the appointment of an arbitrator, but, in essence, seeks a declaration from this court that there exists no arbitrable dispute between the parties. Therefore, what the petitioner is seeking is that this court should decide and declare that no arbitration is possible because there is no arbitrable dispute. If that were to be the case, then there would be no question of appointment of any arbitrator. The whole thrust of Section 11 is with regard to the appointment of an arbitrator. What the petitioner is seeking would run counter to the very object of Section 11 and, therefore, that cannot be permitted.

11. In view of the aforesaid, this petition is not maintainable. The same is dismissed.

**BADAR DURREZ AHMED**
**(JUDGE)**

**August 24, 2007**

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